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No. 87-716

In the Supreme Court of the United States

OCTOBER TERM, 1987

REINHOLD KULLE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the immigration judge properly found petitioner deportable under Section 241(a)(19) of the Immigration and Nationality Act (the Holtzman Amendment) on the ground that, as a concentration camp guard, he engaged in the persecution of persons because of their race, religion, nationality, or political opinions.

2. Whether petitioner's false statement on his visa application, where he claimed that he was in the *Wehrmacht* (the German Army) during World War II, when in fact he was in the "Death's-Head" Division of the *Waffen* SS and served as a concentration camp guard, constituted a misrepresentation of a material fact, within the meaning of Section 212(a)(19) of the Immigration and Nationality Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 825 F.2d 1188. The opinion of the Board of Immigration Appeals (Pet. App. B1-B40) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1987. The petition was filed on October 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). For the reasons discussed below, however, we submit that in light of the fact that petitioner has already been deported, this Court does not have jurisdiction to consider petitioner's claims. See 8 U.S.C. 1105a(c).

STATEMENT

1. Petitioner is a German citizen who was admitted to the United States as a lawful permanent resident on November 7, 1957. On December 3, 1982, an order to

show cause was served on petitioner, alleging that he was deportable under Section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. (& Supp. IV) 1251(a)(19) (the Holtzman Amendment), as a person who had assisted in the persecution of others due to race, religion, nationality, or political beliefs in association with the government of Nazi Germany. The order to show cause also alleged that petitioner was deportable under Section 241(a)(1) of the Act, 8 U.S.C. 1251(a)(1). He was deportable under that provision, the order alleged, because at the time of his entry he was excludable by law under Sections 212(a)(19) and 212(a)(20) of the Act, 8 U.S.C. (& Supp. IV) 1182(a)(19) and 1182(a)(20), on the ground that he had procured his visa by fraud and by willfully misrepresenting a material fact. The alleged misrepresentation was petitioner's statement, in applying for his visa, that during World War II he had served in the *Wehrmacht*, the German Army, when in fact he had been in the *Waffen* SS and in that capacity had served as a concentration camp guard.

The order to show cause alleged that from 1940 to 1945, petitioner was an enlisted member of the *Waffen* SS and served in its "Death's-Head" Division. As a member of that organization, petitioner was assigned to duty at the Gross-Rosen concentration camp in what was then eastern Germany, where he was alleged to have acted as a guard for prisoners sent to do forced labor. See Pet. App. B6-B8.

After a lengthy hearing (see Pet. App. B4-B5, B10-B23), the immigration judge found by clear and convincing evidence that petitioner was subject to mandatory deportation under the Holtzman Amendment, Section 241(a)(19) of the Act, 8 U.S.C. (& Supp. IV) 1251(a)(19). The immigration judge heard four former inmates and an expert witness testify about the conditions at the Gross-Rosen concentration camp. Those witnesses, whom the immigration judge found credible, testified that Gross-Rosen

was a forced labor camp principally for Polish political prisoners and members of other ethnic and national origin groups. Based on the testimony of those witnesses, the immigration judge found that petitioner had "assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion" (8 U.S.C. (& Supp. IV) 1251(a)(19)), and that he was therefore deportable under the Holtzman Amendment. Pet. App. B5. In light of that finding, the immigration judge found it unnecessary to decide whether there were other grounds on which petitioner was also deportable.

The Board of Immigration Appeals affirmed (Pet. App. B1-B40). In addition to finding petitioner deportable under Section 241(a)(19), the Board found that the record at the hearing before the immigration judge established that petitioner was also deportable under Sections 212(a)(19) and 212(a)(20) of the Act, 8 U.S.C. (& Supp. IV) 1182(a)(19) and 1182(a)(20), because he made material false statements in his visa application concerning his military service record (Pet. App. B38-B39). Finally, the Board held that petitioner was ineligible for discretionary relief from deportation (*id.* at B39-B40).

2. The court of appeals also affirmed (Pet. App. A1-A23). The court held that there was clear and convincing evidence, based on the expert testimony and the testimony of the four former camp inmates, that the Gross-Rosen concentration camp was a place of "persecution" within the meaning of the Holtzman Amendment and that petitioner, as a camp guard, had "assisted" in that persecution, even though the evidence did not show that petitioner was personally involved in any specific atrocities (*id.* at A10-A14). The court further held that the immigration judge conducted the hearings fairly and in accordance with the rules governing deportation proceedings (*id.* at A14-A17).

As an alternative ground supporting the order of deportation, the court upheld the Board's conclusion that peti-

tioner had made material false statements on his visa application, which rendered his entry fraudulent. As the court noted, petitioner stated in his visa application only that he had been "in the Army"; however, petitioner had admitted that because he feared that his application would be disapproved if he disclosed the true nature of his wartime occupation, he did not reveal that he had been a member of the *Waffen* SS and had served as a guard at the Gross-Rosen concentration camp (Pet. App. A18-A23).

Almost two months after the court of appeals entered its judgment, petitioner applied to this Court for a stay of deportation. Justice Stevens denied the motion for a stay, and petitioner was deported to the Federal Republic of Germany on October 26, 1987.

ARGUMENT

1. As a threshold matter, we submit that this Court does not have jurisdiction to consider petitioner's claims. Petitioner was deported from the United States on October 26, 1987. Although he challenges the grounds on which the deportation order was based, he does not suggest that the deportation itself was unlawful or that it was effected in an unlawful manner. Section 106(c) of the Immigration and Nationality Act provides that an order of deportation "shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order" (8 U.S.C. 1105a(c)). That statute has been held to bar judicial review of a deportation order once the alien has left the country. See *Umanzor* v. *Lambert*, 782 F.2d 1299 (5th Cir. 1986).

Some courts have held that the term "departed" is limited to voluntary departures and legally executed deportations. See *Newton* v. *INS*, 622 F.2d 1193, 1195 (3d Cir. 1980); *Mendez* v. *INS*, 563 F.2d 956, 958 (9th Cir. 1977); see also *Umanzor* v. *Lambert*, 782 F.2d at 1306 (Brown, J., dissenting). In this case, petitioner does not

suggest that there was anything wrong with the manner in which the Immigration and Naturalization Service effected his deportation; his complaint is with the process that led up to the issuance of the deportation order. Therefore, even under the court-made exception to 8 U.S.C. 1105a(c) for deportations that are "illegally executed," petitioner is not entitled to continue litigating his present claims after his departure from the country.[1] That statutory bar is sufficient in itself to call for denial of the petition.

2. Even if this Court has jurisdiction to review petitioner's deportation order, there is no reason for it to exercise that jurisdiction by granting the petition in this case. Petitioner was ordered deported on two independent grounds, each of which is sufficient to justify the relief granted. Petitioner's challenges to each of the two grounds for deportation involve mainly factual disputes about the nature of the government's proof at the deportation hearing and about the extent to which the immigration judge permitted petitioner to contest that proof.

a. Petitioner's principal claim (Pet. 25-54) is that he was improperly found to have assisted the Nazi government in persecuting individuals because of their race, religion, nationality, or political opinion.

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[1] To be sure, a Sixth Circuit decision and some decisions in the Ninth Circuit appear to hold that the "illegally executed" exception to 8 U.S.C. 1105a(c) applies to any challenge to the procedures that lead up to the issuance of the deportation order. See *Juarez* v. *INS*, 732 F.2d 58, 59-60 (6th Cir. 1984); *Thorsteinsson* v. *INS*, 724 F.2d 1365, 1367-1368 (9th Cir.), cert. denied, 467 U.S. 1205 (1984); *Estrada-Rosales* v. *INS*, 645 F.2d 819, 820-821 (9th Cir. 1981). We submit that those decisions, if carried to their logical limits, would render 8 U.S.C. 1105a(c) a dead letter except as it applies to persons who voluntarily depart after the issuance of a deportation order, a result that is at war with the plain language of the provision. See *Umanzor* v. *Lambert*, 782 F.2d at 1303.

The dispute on this issue is a narrow one. Petitioner concedes that he worked as a guard at the Gross-Rosen concentration camp during World War II. The Holtzman Amendment to the Immigration and Nationality Act, 8 U.S.C. (& Supp. IV) 1251(a)(19), provides for the exclusion of any person who, under the direction of the Nazi government of Germany, assisted in "the persecution of any person because of race, religion, national origin, or political opinion." A person who served as a guard at a concentration camp in which such persecution took place is deemed to have "assisted" in that persecution, even if the person is not shown to have been directly involved in particular acts of persecution. See *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981) (participation as an armed guard at a concentration camp constitutes assisting in persecuting civilians within the meaning of the parallel provision of the Displaced Persons Act); *Schellong* v. *INS*, 805 F.2d 655 (7th Cir. 1986), cert. denied, No. 86-1158 (Apr. 6, 1987). Petitioner's claim is that the immigration judge, the Board of Immigration Appeals, and the court of appeals were wrong in concluding that the evidence at the deportation hearing showed that the Gross-Rosen concentration camp was a place of persecution, rather than a simply a prison for ordinary criminals (see Pet. 26).

Most of the government's evidence at the deportation hearing was addressed to this issue. The evidence is summarized both by the Board of Immigration Appeals (Pet. App. B10-B23) and by the court of appeals (*id.* at A7-A9). It consisted of detailed accounts from four former inmates at the Gross-Rosen concentration camp, who testified about their experiences at the camp, and an expert witness—a professor of modern German history specializing in the Nazi period. Those witnesses testified that Gross-Rosen was not simply a prison for ordinary criminals, but that it was a labor camp for persons from groups disfavored by the Nazi regime, including members

of certain religious groups, such as Jews and Jehovah's Witnesses, political prisoners, and persons of non-Germanic nationality. Inmates from each of those groups were identified by different colored patches they wore on their prison garb, and members of certain groups were systematically treated more harshly than members of other groups (*id.* at B13-B14). The witnesses testified that there were some ordinary criminals in Gross-Rosen, but that those prisoners were treated best of all and were placed in charge of the other inmates (*id.* at B14). In addition, the evidence showed that in late 1943 and 1944, some 10,000 Jewish prisoners were transported from Auschwitz to Gross-Rosen, and that many of them were killed at Gross-Rosen by the SS guards during the winter of 1945 to prevent their liberation by the advancing Russian armies (*id.* at B16). Although petitioner cross-examined each of the government's witnesses at great length,[2] the immigration judge credited their testimony.

In challenging the testimony of the inmate witnesses, petitioner suggests that each of them was an ordinary criminal (see Pet. 7). In fact, the undisputed evidence shows that the witnesses' "crimes" were "ordinary" crimes only in an extraordinary society like Nazi Germany. They were incarcerated for crimes such as writing a letter describing a speech by Winston Churchill (Pet. App. B17), and participating in the Polish underground movement (*id.* at B22-B23); each was forced to wear a patch

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[2] Petitioner claims that he was not given an adequate opportunity to cross-examine the witnesses, but the record shows that the immigration judge permitted extended cross-examination of each of the government's witnesses. Cross-examination of each of the inmate witnesses covered between 146 and 455 pages of the transcript (the direct examination of those witnesses was approximately one-third as long as the cross-examination). The cross-examination of the government's expert witness covered almost 700 pages of the transcript (his direct examination was slightly over 200 pages in length).

designating him as a Polish political prisoner. In any event, regardless of the reason each of the inmate witnesses was sent to Gross-Rosen, their testimony regarding the activities that occurred there was powerful, consistent, and the most reliable source available from which to determine whether Gross-Rosen was a place of persecution, as the government alleged.

With regard to the government's expert witness, petitioner contends (Pet. 34-48) that although his credentials as an expert were generally unobjectionable, he did not have enough information about Gross-Rosen to testify reliably about the nature of the activities there, and he relied too heavily on an eyewitness account of Gross-Rosen written by another government witness, Mieczyslaw Moldawa. But petitioner had an ample opportunity to cross-examine both the expert and Moldawa, and the immigration judge nonetheless found their testimony persuasive, particularly in conjunction with the testimony of the other three former inmates who testified consistently about the nature of the Gross-Rosen concentration camp.

At bottom, petitioner's contention is that the immigration judge should not have believed the five government witnesses, even though petitioner offered no contrary evidence regarding the nature of the activities at Gross-Rosen (he testified at the hearing, but his position was that he was merely assigned to guard the perimeter of the camp and did not know what went on inside the camp). Petitioner's claim regarding the sufficiency of the credible evidence has been rejected by the immigration judge, the Board of Immigration Appeals and the court of appeals; it does not warrant further review by this Court.[3]

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[3] Petitioner complains that he was not allowed sufficient discovery in the course of the deportation proceedings. There is, however, no right to discovery in deportation proceedings. See *Marroquin-Manriquez* v. *INS*, 699 F.2d 129 (3d Cir. 1983), cert. denied, 467 U.S. 1259 (1984); *Quattrone* v. *Nicolls*, 210 F.2d 513 (1st Cir.), cert.

b. Petitioner also contends (Pet. 9-22) that his statement to immigration officials that he was in the German Army (the *Wehrmacht*), when in fact he was in the *Waffen* SS, was not a material misrepresentation that should subject him to deportation. He contends that this issue is similar to the issue presently before the Court in *Kungys* v. *United States*, No. 86-228, and that this case should be held for *Kungys*.

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denied, 347 U.S. 976 (1954). In any event, the government provided a great deal of material to petitioner before and during the hearing. Although petitioner contends that he did not have those materials early enough to make use of them, the deportation hearing was twice continued at petitioner's request; as a result it ended up extending over a ten-month period. The continuances gave petitioner ample time to prepare to meet the government's proof. If petitioner believed that he had not had an adequate opportunity to challenge the testimony of any of the government's witnesses, he could have recalled any of them during his own case for further examination, but he did not seek to do so.

There is no merit to petitioner's claim (Pet. 32-34) that the immigration judge erred by refusing to provide petitioner with copies of the immigration records of two of the government's witnesses. Petitioner has not suggested any reason to believe that those materials could have been helpful to him. Those documents relating to the witnesses' general background are quite different from the prior statement of a witness directly relating to his testimony, which was the document at issue in *Carlisle* v. *Rogers*, 262 F.2d 19 (D.C. Cir. 1958), on which petitioner relies. In sum, petitioner has failed to show that the absence of a right to general discovery had the effect of denying him a fundamentally fair deportation hearing.

Petitioner's further assertion (Pet. 32) that the government "redacted" the "Ludwigsburg papers" is baseless. Those papers are the contemporaneous German documents concerning Gross-Rosen and other concentration camps that were found in the investigative files of the German prosecution in Ludwigsburg, Germany. The government's expert had examined the papers, and he referred to them in the course of his testimony; petitioner cross-examined the expert witness about the papers, but he does not appear to have attempted to obtain a copy of any of them. There is no ground for his claim that the papers were "redacted."

There is no need to hold this case pending the disposition of *Kungys*. First, because the false statement issue was only one of the two independent grounds for petitioner's deportation, it would not change the result in this case even if petitioner were to prevail on that issue. Second, this case is different from *Kungys* in several important respects. In this case, petitioner has admitted making false statements on his visa application; in a 1982 interview with a Department of Justice representative, he admitted having lied when he stated that he was in the German Army (Pet. App. A19-A22). He also admitted that he made that false statement in order to procure a visa; if he had told the truth, he admitted, he feared that he would have been denied entry into this country (*id.* at A20-A21). Finally, the government introduced unequivocal proof—in the form of an affidavit from the vice-consul who processed petitioner's visa application—that if she had known that petitioner had been in the *Waffen* SS and had served as a concentration camp guard, she would not have issued him a visa, because at the time of petitioner's application, wartime service of that sort would have disqualified a visa applicant at the American Consulate-General in Frankfurt, where petitioner applied for and obtained his visa (*id.* at A18-A19). In light of these facts, all of which were brought out at the deportation hearing, it is difficult to imagine how petitioner's false statement could be found to be immaterial under any standard: He made the false statement for the purpose of gaining admission to this country, and if he had told the truth, he would not have been admitted.

Petitioner has two responses. First, he claims (Pet. 9-19) that at the time of his visa application, there was no provision of law that would have resulted in his exclusion because of his service as a concentration camp guard. Therefore, he claims, the vice-consul could not lawfully have denied him a visa on that ground, and his false statement was therefore immaterial. In fact, however, the vice-consul stated in her affidavit that it was the practice of the

consulate at that time not to issue immigrant visas to persons who had engaged in wartime activities such as performing service as a concentration camp guard. Petitioner's false statement was therefore material in the most basic sense that it made the difference between admission and exclusion.

Second, petitioner claims (Pet. 19-22) that a document that he presented with his visa application should have put the consular officials on notice that he had served as a guard at the Gross-Rosen concentration camp. The document in question was a certificate that showed that he had been married during the war at Gross-Rosen. It would have taken remarkable ingenuity for the consular officials to conclude from that document that petitioner, who claimed to have been in the German Army, was in Gross-Rosen because he was serving as a concentration camp guard and therefore must have been in the *Waffen* SS, not the *Wehrmacht*. Petitioner cannot place such reliance on the consular officials' knowledge of German wartime affairs and their powers of inference to overcome the misleading effect of his own falsehood. Because petitioner made an admittedly false statement that was material under any standard, he was excludable under 8 U.S.C. (& Supp. IV) 1182(a)(19) and thus deportable under 8 U.S.C. 1251(a)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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